

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

75-1291

B
P/S

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----x

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

Docket No. 75-1291

VIRGIL P. RIVERS, JR.,

Defendant-Appellant

-----x

BRIEF FOR DEFENDANT-APPELLANT

RUTH E. MOSKOWITZ, ESQ.
Attorney for Defendant-
Appellant
225 Broadway
New York, NY 10007
212-267-4459

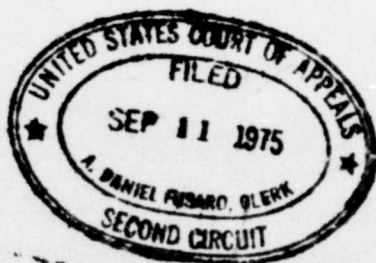


TABLE OF CONTENTS

Questions Presented	1
Statement pursuant to Rule 28(3)	2
Preliminary Statement	2
Statement of Facts	2
Argument	6
 <u>Point I</u>	
THE DEFENDANT DID NOT INTELLIGENTLY WAIVE HIS FIFTH AND SIXTH AMENDMENT RIGHTS TO REMAIN SILENT AND FOR THE ASSISTANCE OF COUNSEL	6
 <u>Point II</u>	
THE IN COURT IDENTIFICATION BY WITNESS NIERENBERG SHOULD HAVE BEEN SUPPRESSED.	9
 <u>Point III</u>	
IT WAS REVERSABLE ERROR FOR THE COURT TO REFUSE TO PROHIBIT THE GOVERNMENT FROM USING A PENDING INDICTMENT TO IMPEACH THE CREDIBILITY OF RIVERS	12
Conclusion	14

TABLE OF CASES, (cont'd)

<u>United States v. Sanders</u> , 479 F.2d 1193 (D.C. Cir. 1973)	10
<u>United States v. Semensohn</u> , 421 F.2d 1206 (2d Cir. 1970)	13
<u>United States v. Williams</u> , 484 F.2d 428 (8d Cir. 1973)	13

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

Docket No. 75-1291

VIRGIL P. RIVERS, JR.,

Defendant-Appellant.

-----X

QUESTIONS PRESENTED

1. Whether there was an intelligent waiver by Rivers, and whether the signed confession should have been admitted into evidence.
2. Whether the in court identification made by the witness Nierenberg should have been suppressed.
3. Whether the court should have prohibited the Government from using a pending indictment to impeach credibility of Rivers.

STATEMENT PURSUANT TO RULE 28(3)

Preliminary Statement

On July 25, 1975, Virgil P. Rivers was convicted of Bank Robbery (18 U.S.C. 2113(a)(d)) and Conspiracy (18 U.S.C. 372). Rivers was sentenced to a term of 18 years on the charge of Bank Robbery and a concurrent term of five years on the charge of Conspiracy.

On August 4, 1975, pursuant to the Criminal Justice Act, this Court appointed Ruth Moskowitz to represent appellant, Virgil P. Rivers.

STATEMENT OF FACTS

On July 15, 1974, a branch of First National City, located at 8115 Flatlands Avenue, was robbed. A subsequent audit showed that \$3,310.00 was stolen. (250)*

On July 27, 1974, Virgil P. Rivers was arrested and charged with Bank Robbery. (295)

Shortly before the robbery occurred, a bystander, Gerald Nierenberg, noticed a taxi cab with the letters

*Numerals in parenthesis refer to pages of the transcript of the proceedings in this case.

HEW on it. In the cab, he observed two men. (186-187) Mr. Nierenberg then went into the bank and was present during the robbery. (189) There were two robbers. They were male and black and both had their faces covered. (190)

Subsequently, Mr. Nierenberg was shown several photographs by F.B.I. Agent Augustitus. Mr. Nierenberg told the F.B.I. agent that one of the photographs resembled one of the bank robbers. (220) Agent Augustitus testified at the pre-trial hearing that Nierenberg "could not specifically say that this is a bank robber because the individual he saw in the taxi cab, although closely resembled, had a thinner face than the face portrayed in the photograph." (49) No line-up was held. Subsequently, at the trial on June 10, 1975, Nierenberg made an in court identification of the man who was in the taxi cab. No other witnesses identified Rivers either as being in the taxi cab or as participating in the robbery.

John Lefkowitz testified that he is a taxi fleet owner and runs a corporation named HEW Taxi Corporation. (255-256) Two trip tickets for HEW Taxi Corporation were introduced into evidence over defense objection. (263-265) On one of

these was written the name Ramirez. That ticket indicated that Ramirez was not in Brooklyn on July 15, 1974. On the other trip ticket was the name of Virgil P. Rivers. The only notation that appeared on that trip ticket indicated that the original trip ticket was lost. (278)

Mr. Lefkowitz was unable to identify Virgil Rivers in court. He further admitted that the only way that he knew the location of a given driver at a specific time is from what the driver himself wrote on the trip ticket. (268)

A signed confession by Rivers was admitted into evidence over defense objection. Agent Augustitus testified that he advised Rivers of his rights and that Rivers signed a "waiver of rights" form. (18-19) He further testified that Rivers orally admitted committing the robbery and agreed to furnish a signed statement. (20) Agent Augustitus prepared a statement in his own handwriting and Rivers signed the statement that Augustitus prepared. (21)

On cross examination of Agent Augustitus, he admitted that he did not give Rivers an opportunity to make a

phone call when he was initially apprehended. (52) He testified that he observed track marks on River's arms (52) and that from experience, these marks would indicate that Rivers was a drug user. (53) Furthermore, Agent Augustitus ascertained from Rivers that he was a heroin user and that he spent \$100 per day to support his habit. (66)

Augustitus testified that any notes made during this interview were destroyed by himself, (59) and that although the statement was taken at the main F.B.I. office where tape recorders and stenographers were available, Augustitus did not utilize them. (58)

At the pre-trial hearing, Virgil Rivers testified on his own behalf. He stated that he was a drug addict. (100) Furthermore, at the time he was arrested, he was sick from withdrawal (101), and his physical condition worsened during the interrogation. (103) He stated that he signed the statement because he believed that he would receive medication for his sickness after he did so. (106)

At the pre-trial hearing, defense counsel's motion to suppress the confession (139-140), and the in court

identification of Mr. Rivers by Nierenberg were denied.

(145-6) Counsel's motion for a pre-trial ruling to exclude the use of pending criminal matters to impeach Rivers credibility was also denied. (159)

ARGUMENT

POINT I

THE DEFENDANT DID NOT INTELLIGENTLY WAIVE HIS FIFTH AND SIXTH AMENDMENT RIGHTS TO REMAIN SILENT AND FOR THE ASSISTANCE OF COUNSEL.

A waiver of a constitution right and privilege is not to be lightly presumed:

"A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. The determination of whether of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused."

Johnson v. Zerbst, 304 U.S. 458 (1938)
at 464

The government bears a heavy burden to demonstrate an intelligent waiver in this situation where the statement was taken in the absence of counsel. Miranda v. Arizona, 384 U.S. 436 (1965). The government must show that there was a meaningful act of volition by Rivers when he signed

the statement, Blackburn v. Alabama, 361 U.S. 199 (1960).

It is submitted that in the facts and circumstances of this case, the government has not met its burden.

Rivers was not given the opportunity to make a phone call at the precinct. (52) The agent observed "track marks" on his arm and from his experience, knew that this indicated drug usage. (53) These facts, combined with the agents testimony that no stenographer or tape recorder were employed, although they were available, raises grave doubts with respect to the confession. Additional suspicion is further aroused by the agent's destruction of the notes made during the interrogation. The testimony of the agent concerning two signed statements (26-31), one implicating the co-defendant, and one omitting Copeland's name, must also give one cause as to authenticity of these statements. It would appear that Rivers must have been conversant with the Federal case law and then confessed to suit all contingences.

It is also significant that, although the agent appeared to keep detailed and precise records of the investigation, there is no indication on the body of the confessions of the time that they were signed by Rivers.

The agent never explained this omission and this omission, coupled with the fact that Rivers was arrested on a Saturday and kept incommunicado until the following Monday (62), raises further questions. All these facts must be considered in the determination of the admissibility of the confession. The mere reciting by the agent that he gave the Miranda warnings should not suffice. As it was so aptly put by the Supreme Court:

"We cannot give any weight to recitals which merely formalize constitutional requirement. Formulas of respect for constitutional safeguards cannot prevail over the fact of life that contradict them. They may not make a cloak for inquisitorial practices and make an empty form of the due process of law for which free men fought and died to obtain." Haley v. Ohio, 332 U.S. 596 (1948) at 601

It is undisputed that Rivers was a drug addict. In Townsend v. Sain, 372 U.S. 293 (1962), the Supreme Court held that a drug induced confession could not be the "product of a rational intellect and a free will," at 307. See also Beecher v. Alabama, 389 U.S. 35 (1967); United States v. Guaydacan, 470 F.2d 1173 (9th Cir 1972);

Gladden v. Unsworth, 396 F.2d 373 (9th Cir. 1968).

Rivers testimony that he signed the statement because he was sick from withdrawal, considered with the undisputed evidence, to wit: the destruction of the agents original notes, the lack of a stenographic transcript, the omission of the time that the statement was signed, are a combination of circumstances that must preclude finding that Rivers knowingly and intelligently waived his constitutional rights to remain silent and for the assistance of counsel.

POINT II

THE IN COURT IDENTIFICATION BY WITNESS
NIERENBERG SHOULD HAVE BEEN SUPPRESSED.

At the pre-trial hearing to suppress the in court identification of Nierenberg, the government called as its only witness Agent Augustitus. Agent Augustitus testified that he showed Mr. Nierenberg six photographs including a photograph of Rivers. (47) Nierenberg selected one photograph stating it "closely resembled one of the individuals he saw in the yellow taxi cab." (47) Nierenberg did not testify at the hearing. However, at

the trial he testified that he had selected the photograph of Rivers as being similar to the man in the cab. (197) He was asked the following questions by the Assistant United States Attorney, and gave the following answers:

Q. Mr. Nierenberg, based upon your independent recollection of the man in the taxi cab, and of the circumstances and events of the day, can you look around this courtroom and point out, if you can, the man that you saw on that date? Can you do that, Sir?

A. Over there

.....

Mr. Levin-Epstein: May the record indicate the defendant Virgil Rivers, Jr. (206-7)

The circumstances of this in court identification was so prejudicial as to be violative of due process of law. Stovall v. Denno, 388 U.S. 293. Appellants contention is not merely that the photograph identification was impermissibly suggestive. Simmons v. United States, 390 U.S. 377 (1968). See also United States v. Sanders, 479 F.2d 1193 (D.C. Cir. 1973).

The circumstances at bar are very different from those in Simmons. In the instant case, the only eye witness selected a photograph of Rivers as being "similar"

to the man in the taxi cab, not to the robber. In fact, he told the agent that the robber had "a thinner face." He never viewed a line-up. Almost one year after the robbery, he is asked to look around the courtroom to point out the man he saw on that date. At that point, Nierenberg selected one of the two black males seated at the counsel table. (210) This is clearly distinguishable from a situation where a witness had an opportunity to view a perpetrator over an extended period of time, and then selects his photograph as being that of the culprit. See, eg. United States ex rel Gonzalez v. Zelker, 477 F.2 797 (2d Cir. 1973); Haberstrom v. Montanye, 493 F.2d 483 (2d Cir. 1974). Thus, there was a tentative pre-trial identification of Rivers as a man who was in the general vicinity, followed by the in court identification of Rivers under the most prejudicial of circumstances, viz., the witness having come to court with the knowledge that a man has been charged, is on trial, and is at the counsel table, and is then asked to make an identification. Appellant contends that this in court identification is an impermissible show-up.

POINT III

IT WAS REVERSABLE ERROR FOR THE COURT TO REFUSE TO PROHIBIT THE GOVERNMENT FROM USING A PENDING INDICTMENT TO IMPEACH THE CREDIBILITY OF RIVERS.

Rivers did not testify on his own behalf at the trial, (He did testify at the pre-trial hearings). Prior to trial, counsel advised the court that Mr. Rivers had no criminal convictions, but he did have several pending indictments, including one indictment in which Copeland (the co-defendant in the instant case) was also a defendant. Counsel asked the court to rule that the Government may not question Rivers about those pending matters. The court ruled that such questions would be admissible to impeach Rivers if he testified. (155) Counsel indicated the Court's ruling would require reconsideration on her part as to whether to call Rivers as a witness on his own behalf, (160) and Rivers was not called by the defense.

The particular circumstances of each case must be considered in the determination of whether the "prejudicial effect of impeachment far outweighs the probative value of

the prior conviction to the issue of credibility," Luck v. United States, 348 F.2d 767 (D.C. Cir. 1965).

In the case at bar, the signed confession of Rivers was the most incriminating evidence against him. He was not positively identified by any witness as actually committing the robbery. No other evidence was presented to directly connect him with the crime. Thus, it became crucial for Rivers to take the stand on his own behalf and let the jury hear his story. However, after the court ruled that it was permissible to use the pending indictment of Rivers and Copeland to impeach Rivers, he did not testify. Thus, the jury heard the agents version of the confession uncontroverted by the defendant.

The general rule is that "in a trial a witness's act of misconduct are not admissible to impeach his credibility unless the acts resulted in the obtaining of a conviction." United States v. Semensohn, 421 F.2d 1206 (2d Cir. 1970). See also United States v. Kahan, 479 F.2d 290 (2d Cir. 1973); United States v. Williams, 484 F.2d 428 (8d Cir. 1973).

In Semensohn, the Court held that it was improper for the government to use a prior act of misconduct in a

situation where the defendant had pleaded guilty but where sentence had not been imposed. The instant situation falls squarely within the holding of Semensohn.

Counsel was thus placed in the dilemma of deciding whether to call Rivers and revealing to the jury that he had a pending indictment, or to refrain from calling him and leaving the confession to stand uncontradicted. The record is clear that counsel had intended to call Rivers as a witness at the trial, but reconsidered when the Court made the pre-trial determination to allow the government to impeach Rivers by questioning him about the pending case. Thus, Rivers was deprived of the opportunity of going to the jury and "telling his story."

CONCLUSION

FOR THE ABOVE STATED REASONS,
VIRGIL RIVERS CONVICTION
SHOULD BE REVERSED AND A NEW
TRIAL GRANTED.

Respectfully submitted,

RUTH MOSKOWITZ
Attorney for Defendant-
Appellant
VIRGIL RIVERS
225 Broadway
New York, NY 10007

